Proposed Discovery Amendments

CHAPTER 1
RULES OF CIVIL PROCEDURE

DIVISION IV
PLEADINGS AND MOTIONS

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B. PLEADINGS, FORMAT AND CONTENT

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Rule 1.413 Verification abolished; affidavits; certification.

1.413(1) Pleadings need not be verified unless special statutes so require and, where a pleading is verified, it is not necessary that subsequent pleadings be verified unless special statutes so require. Counsel's signature to every motion, pleading, or other paper shall be deemed a certificate that: counsel has read the motion, pleading, or other paper; that to the best of counsel's knowledge, information, and belief, formed after reasonable inquiry, it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law; and that it is not interposed for any improper purpose, such as to harass or cause an unnecessary delay or needless increase in the cost of litigation. If a motion, pleading, or other paper is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the pleader or movant. If a motion, pleading, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay the other party or parties the amount of the reasonable expenses incurred because of the filing of the motion, pleading, or other paper, including a reasonable attorney fee. The signature of a party shall impose a similar obligation on such party. <u>This rule does not apply to disclosures, discovery requests, responses, objections, and motions under rules 1.500 through 1.517, which are governed by rule 1.503(6).</u>

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Rule 1.500 Duty to disclose; required disclosures.[1]

1.500(1) *Initial disclosures.*

a. In general. Except as exempted by rule 1.500(1)(e) or as otherwise stipulated or ordered by the court, a party must, without awaiting a discovery request, provide to the other parties:

(1) The name and, if known, the address, telephone numbers, and electronic mail address of each individual likely to have discoverable information—along with the subjects of that information—that the disclosing party may use to support its claims or defenses, unless the use would be solely for impeachment.

(2) All documents, electronically stored information, and tangible things that the disclosing party has in its possession, custody, or control and may use to support its claims or defenses, unless the use would be solely for impeachment.

1. Unless good cause is stated for not doing so, copies of the documents or electronically stored information listed must be served with the disclosure.

2. If copies of any document or electronically stored information are not produced because of undue burden or expense, the disclosing party must provide a description by category and location and the name and address of the custodian of the document or electronically stored information.

3. A party who provides documents in disclosure must produce them as they are kept in the usual course of business.

(3) A computation of each category of damages claimed by the disclosing party—who must also make available for inspection and copying as under rule 1.512 the documents or other evidentiary material, unless privileged or protected from disclosure, on which each computation is based, including materials bearing on the nature and extent of injuries suffered; provided, however, that this section does not require disclosure of the exact dollar amounts claimed for noneconomic damages.

(4) For inspection and copying as under rule 1.512, and notwithstanding rule 1.503(2),[2] the declarations page of any insurance agreement under which any person carrying on an insurance

[1] This entire rule is added. As a matter of chronology, initial disclosures should precede the other discovery methods. In the Federal Rules, the initial disclosure rule is the first provision of the first discovery rule—FRCP 26(a). Arizona has added a rule 26.1 that precedes its remaining discovery provisions. The amended Iowa rule utilizes the reserved rule 1.500 for the disclosure provision to help preserve the current numbering system.

[2] Existing rule 1.503(2) also governs discovery of insurance agreements. That rule expressly provides that "[i]nformation concerning the insurance agreement is not by reason of disclosure admissible in evidence at trial. For purposes of this rule, an application for insurance shall not be treated as part of an insurance agreement." The Committee decided to retain this rule to recognize that parties are still free to seek additional discovery concerning disclosed insurance agreements.

business may be liable to satisfy part or all of a judgment which may be entered in the action or to indemnify or reimburse for payments made to satisfy the judgment, and, in any action where coverage is or may be contested, a copy of the agreement and all letters from the insurer to the insured regarding coverage.

b. Personal injury actions.[3] In addition to the initial disclosures required by rule 1.500(1)(a), any party asserting a claim for damages for personal or emotional injuries must, without awaiting a discovery request, provide to the other parties:

(1) The claimant's full name and date of birth.

(2) The claimant's Medicare health insurance claim number (HICN).

(3) The names and addresses of all doctors, hospitals, clinics, pharmacies, and other health care providers consulted by the claimant within five years prior to the date of injury up to the present date.[4]

(4) Legally sufficient written waivers allowing the opposing party to obtain those records subject to appropriate protective provisions authorized by rule 1.504. The opposing party must give contemporaneous notice to the claimant when it uses the waivers to obtain records and must provide a copy of all records obtained by waiver to the claimant and all other parties. Any party who requests that the opposing party produce these records in non-electronic form must bear the opposing party's costs of producing them in that form.

c. Claims for lost time or earning capacity. In addition to the initial disclosures required by rule 1.500(1)(a), any party asserting a claim for damages for lost time or lost earning capacity must, without awaiting a discovery request, provide to the other parties:

(1) The claimant's federal and state income tax returns for the five years prior to the date of disclosure.

(2) The names and addresses of all persons by whom the claimant has been employed for the five years prior to the date of disclosure.

(3) Legally sufficient written waivers allowing the opposing party to obtain the claimant's personnel files and payment histories from each employer subject to appropriate protective provisions authorized by rule 1.504.

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[3] This was taken from Colorado's Rule 16.1 governing Simplified Proceedings. The Committee decided to require personal injury initial disclosures in all civil cases, not just expedited civil actions. In addition, the Committee has proposed specific disclosures in cases claiming lost time or lost earning capacity. *See* 1.500(1)(d). Rather than include other case-specific disclosures, the Committee decided to encourage other practice-specific disclosures (e.g., employment actions) through presumptively permissible pattern interrogatories. *See* new rule 1.509(4).

[4] This provision requires disclosure of any consultation within the five year period prior to the injury, continuing to the present date. Thus, like other disclosures, this information is subject to a continuing duty to supplement. *See* rule 1.500(5).

1. The opposing party must give contemporaneous notice to the claimant when it uses the waiver to obtain records and must provide a copy of all records obtained by waiver to the claimant and all other parties.

2. Any party who requests that the opposing party produce these records in non-electronic form must bear the opposing party's costs of producing them in that form.

d. *Domestic relations proceedings.*

(1) In lieu of the initial disclosures required by rule 1.500(1)(a), in domestic relations actions, including divorce, custody, modification, and paternity actions, each party must, without awaiting a discovery request, provide to the other party copies of the following:

1. Paystubs or other documentation showing the party's income from all sources, including all deductions for federal and state taxes, health insurance premiums, union dues, and mandatory pension withholdings for the past six months. If there are children involved, the party providing health insurance must provide a breakdown of the cost of single health insurance and the cost of a family plan.

2. The party's federal and state income tax returns, including all schedules and W-2's, for the prior three years, if not in the possession of the other person.

3. A current financial affidavit, including a description of all assets and liabilities.

4. Statements of account or other documentation to support the assets or liabilities listed in the financial affidavit.

(2) If the action is a modification case or an unmarried custody case, the parties must provide only the information contained in paragraphs 1 and 2.

e. Proceedings exempt from initial disclosure.[5] Unless otherwise ordered by the court or agreed to by the parties, the requirements of rule 1.500(1)(a) through (d) do not apply to the following:

(1) actions for certiorari or for judicial review of administrative agency actions under Iowa Code chapter 17A;

(2) actions for forcible entry and detainer;

[5] The Committee considered including "actions to foreclose a security interest in real property" within the list of proceedings exempt from initial disclosures. However, the Committee decided to subject contested foreclosure proceedings to the same disclosure obligations as other proceedings. In a default situation, where initial disclosures will not occur, the Committee recommends that a set of disclosures be developed and required of foreclosure plaintiffs who seek a default judgment. A similar approach apparently already exists in consumer default proceedings. Iowa Code § 537.5114(2).

(3) adoption proceedings, name change proceedings, actions under Iowa Code Chapter 236, actions initiated by the Iowa Child Support Recovery Unit, and domestic relations proceedings in which there are no contested claims;

(4) Actions for post-conviction relief or any other proceeding to challenge a criminal conviction or sentence.

(5) Probate proceedings in which there are no contested claims.

(6) Juvenile proceedings.

(7) Mental health proceedings.

(8) Actions under Iowa Code chapters 229 and 229A.[6]

(9) Actions to enforce an arbitration award or an out-of-state judgment.

f. Time for initial disclosures—in general. A party must make the initial disclosures at or within 14 days after the parties' rule 1.507 discovery conference unless a different time is set by stipulation or court order, or unless a party objects during the conference that initial disclosures are not appropriate in the action and states the objection in the proposed discovery plan. In ruling on the objection, the court must determine what disclosures, if any, are to be made and must set the time for disclosure.

g. Time for initial disclosures—for parties served or joined later. A party that is first served or otherwise joined after the rule 1.507 discovery conference must make the initial disclosures within 30 days after being served or joined, unless a different time is set by stipulation or court order.

h. Basis for initial disclosure; unacceptable excuses. A party must make its initial disclosures based on the information then reasonably available to it. A party is not excused from making its disclosures because it has not fully investigated the case, because it challenges the sufficiency of another party's disclosures, because another party has not made its disclosures, or because the information is in the possession, custody, or control of its insurance carrier.[7]

[6] This covers hospitalization of persons with mental illness and commitment of sexually violent predators.

[7] The Advisory Committee indicated that a party should not be excused from timely disclosure because its insurance carrier has not transmitted its file to counsel.

1.500(2) *Disclosure of expert testimony.*[8]

a. In general. In addition to the disclosures required by rule 1.500(1), a party must disclose to the other parties the identity of any witness it may use at trial to present evidence under Iowa Rules of Evidence 5.702, 5.703, and 5.705.

b. Witnesses who must provide a written report. Unless otherwise stipulated or ordered by the court, this disclosure must be accompanied by a written report—prepared and signed by the witness—if the witness is one retained or specially employed to provide expert testimony in the case or one whose duties as the party's employee regularly involve giving expert testimony. The report must contain the following:

(1) A complete statement of all opinions the witness will express and the basis and reasons for them.

(2) The facts or data considered by the witness in forming the opinions.

(3) Any exhibits that will be used to summarize or support the opinions.

(4) The witness's qualifications, including a list of all publications authored in the previous ten years.

(5) A list of all other cases in which, during the previous four years, the witness testified as an expert at trial or by deposition.

(6) A statement of the compensation to be paid for the study and testimony in the case.

c. Witnesses who do not provide a written report. Unless otherwise stipulated or ordered by the court, if the witness is not required to provide a written report, this disclosure must state:

(1) The subject matter on which the witness is expected to present evidence under Iowa Rules of Evidence 5.702, 5.703, or 5.705.

(2) A summary of the facts and opinions to which the witness is expected to testify.

d. Time to disclose expert testimony. A party must make these disclosures at the times and in the sequence that the court orders. Absent a stipulation or a court order, and except as otherwise provided by statute, the disclosures must be made:

(1) at least 90 days before the date set for trial; or

[8] This is patterned on the Federal Rules approach of requiring automatic and detailed disclosure of expert information without the need for a discovery request. *See* Fed. R. Civ. P. 26(a)(2). A corresponding (and substantial) amendment to Iowa Rule 1.508 has also been made.

(2) if the evidence is intended solely to contradict or rebut evidence on the same subject matter identified by another party under rule 1.500(2)(b) or (c), within 30 days after the other party's disclosure.

e. Supplementing the disclosure. The parties must supplement these disclosures when required under rule 1.508(3).

1.500(3) *Pretrial disclosures.*[9]

a. In general. In addition to the disclosures rules 1.500(1) and (2) require, a party must provide to the other parties and promptly file the following information about the evidence that it may present at trial other than solely for impeachment:

(1) The name and, if not previously provided, the address, telephone numbers, and electronic mail address of each witness—separately identifying those the party expects to present and those it may call if the need arises.

(2) The page and line designation of those witnesses whose testimony the party expects to present by deposition and, if not taken stenographically, a transcript of the pertinent parts of the deposition.

(3) An identification of each document or other exhibit, including summaries of other evidence—separately identifying those items the party expects to offer and those it may offer if the need arises.

b. Time for pretrial disclosures; objections. Unless the court orders otherwise, these disclosures must be made at least 14 days before trial.[10] Within seven days after they are made, unless the court sets a different time, a party may serve and promptly file a list of the following objections: any objections to the use under rule 1.704 of a deposition designated by another party under rule 1.500(3)(*a*)(2), and any objection, together with the grounds for it, that may be made to the admissibility of materials identified under rule 1.500(3)(*a*)(3). An objection not so

[9] Currently, the duty to disclose trial witnesses, deposition testimony, and exhibits is governed by the Case Processing Standards in rule 23.5—Form 2 of the Iowa Rules of Court. The judges on the Committee indicate that many lawyers are unaware that rule 23.5—Form 2 is mandatory and that it applies to all civil actions. This proposed rule would move the duty to make pretrial disclosures out of chapter 23 (Time Standards for Case Processing) and into the Iowa Rules of Civil Procedure. Sections (a) and (b) of this proposed rule mirror Fed. R. Civ. P. 26(a)(3).

[10] The Federal Rules require that pretrial disclosures occur within 30 days of trial and that objections occur within 14 days thereafter. Rule 23.5—Form 2 of the Iowa Rules of Court imposes a much later deadline, requiring disclosure of all witness and exhibit lists at least 7 days before trial, with objections due within 5 days thereafter (2 days before trial). The Committee determined that 30 days would require counsel to put in unnecessary time and effort too far in advance of trial. On the other hand, the Committee regarded the current 7 day deadline as too close to trial. The Committee recommends that parties be required to make their pretrial disclosures two weeks in advance of trial and that opposing counsel be given one week thereafter for response. Rule 23.5—Form 2 would need to be amended to reflect these changes, if approved. Additionally, in order to facilitate notice to counsel, the Committee recommends that Rule 23.5—Form 2 be moved to the Forms accompanying the Rules of Practice and Procedure. *See* Iowa Ct. R. 1.1901.

made—except for one under Iowa rule of evidence 5.402 or 5.403—is waived unless excused by the court for good cause.

c. Duty to supplement unaffected. Rule 1.500(3) does not affect the obligation of a party to timely supplement disclosures and discovery responses as required by rule 1.503(4)(a)(2).[11]

1.500(4) *Form of disclosures.* Unless the court orders otherwise, all disclosures under rule 1.500 must be in writing, signed, and served.

1.500(5) *Supplementing the disclosures.* The parties must supplement these disclosures when required under rule 1.503(4) and 1.508(3).

[11] The Committee added 1.500(3)(c) to emphasize that the pretrial disclosure rule does not interfere with the duty to supplement answers to discovery requesting disclosure of trial witnesses. *See* Iowa R. Civ. P. 1.503(4)(a)(2).

Rule 1.501 Discovery methods.

1.501(1) ~~Parties~~ In addition to the disclosures required by rule 1.500, and subject to the timing provisions of rule 1.505,[12] parties may obtain discovery by one or more of the following methods: depositions upon oral examination or written questions; written interrogatories; production of documents or things or permission to enter upon land or other property, for inspection and other purposes; physical and mental examinations; and requests for admission.

1.501(2) The rules providing for discovery and inspection ~~shall~~should be liberally construed, ~~and shall be enforced~~ administered, and employed by the court and the parties[13] to secure the just, speedy, and inexpensive determination of every action and proceeding and to provide the parties with access to all relevant facts. ~~Discovery shall be conducted in good faith, and responses to discovery requests, however made, shall fairly address and meet the substance of the request.~~

1.501(3)[14] ~~Unless the court orders otherwise under rule 1.504, the frequency of use of these methods is not limited.~~ Discovery must be conducted in good faith, and responses to discovery requests, however made, must fairly address and meet the substance of the request.[15] Any discovery motion presented to the court must include a certification that the movant has in good faith personally spoken with or attempted to speak with other affected parties in an effort to resolve the dispute without court action. The certification must identify the date and time of the personal conference and of any attempts to confer.[16]

1.501(4) A rule requiring a matter to be under oath may be satisfied by an unsworn written statement in substantially the following form: "I certify under penalty of perjury and pursuant to the laws of the state of Iowa that the preceding is true and correct.

_____ _____

Date Signature"

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[13] This amendment is based upon Fed. R. Civ. P. 1. The federal Advisory Committee has recommended further amending Rule 1 to emphasize that both the court and the parties share responsibility to secure the "just, speedy, and inexpensive determination" of lawsuits and to cooperate to achieve these goals with respect to discovery.

[14] Rule 1.501(3) has been amended to clarify that the frequency of use of discovery methods is limited by the discovery moratorium imposed by rule 1.505.

[15] Moved from rule 1.501(2).

[16] A similar provision is contained in rule 1.504(3) governing motions for protective order and in rule 1.517(5) governing sanctions and motions to compel. This makes the certificate of conference requirement apply to all discovery motions.

Rule 1.503 Scope of discovery.

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1.503(1) *In general.* Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things, the identity and location of persons having knowledge of any discoverable matter~~.~~ and the identity of witnesses the party expects to call to testify at the trial.[17] It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

a. Unless otherwise provided in a request for discovery, a request for the production of a "document" or "documents" shall encompass electronically stored information. Any reference in the rules in this division to a "document" or "documents" shall encompass electronically stored information.

b. All discovery is subject to the limitations of rule 1.503(8).[18]

1.503(2) *Insurance agreements.* ~~A~~ In addition to the initial disclosures rule 1.500(1)(a)(4) requires,[19] a party may obtain discovery of the existence and contents of any insurance agreement under which any person carrying on an insurance business may be liable to satisfy part or all of a judgment which may be entered in the action or to indemnify or reimburse for payments made to satisfy the judgment. Information concerning the insurance agreement is not

[17] The Committee recommends amending the existing scope of discovery to expressly include the identity of trial witnesses. Rule 1.509(2) currently permits interrogatories that relate to "any matters which can be inquired into under rule 1.503, including . . . the names and addresses of witnesses the party expects to call to testify at the trial." Likewise, rule 1.503(4)(a)(3) requires supplementation of "[t]he identity of each person expected to be called as a witness at trial." At least for trial witnesses, then, the amendment to the scope of discovery is supported by existing rules. Presumably, this amendment would prohibit the practice of refusing to answer interrogatories seeking trial witnesses until required by rule 23.5—Form 2 [rule 1.500(3) if amended]. It would similarly assist counsel in determining whom to depose out of the potentially numerous "persons with knowledge of discoverable facts" disclosed by the opposing party. Existing rules do not appear to permit interrogatories (or supplementation thereof) seeking the identity of trial *exhibits* before the pretrial disclosure deadline. The Committee therefore decided not to amend the scope of discovery to encompass the identity of exhibits the party expects to introduce at trial.

[18] This cross-references the proportionality principles incorporated in the general discovery provisions. Fed. R. Civ. P. 26(b)(1) was similarly amended in 2000:

> Finally, a sentence has been added calling attention to the limitations of subdivision (b)(2)(i), (ii), and (iii). These limitations apply to discovery that is otherwise within the scope of subdivision (b)(1). The Committee has been told repeatedly that courts have not implemented these limitations with the vigor that was contemplated. This otherwise redundant cross-reference has been added to emphasize the need for active judicial use of subdivision(b)(2) to control excessive discovery.

Fed. R. Civ. P. 26 advisory committee note to 2000 amendment (citations omitted).

[19] Although arguably redundant of the initial disclosure obligation in rule 1.500(1)(a)(4), this provision clarifies that additional discovery regarding insurance is still allowed and that discovery does not make insurance admissible.

by reason of disclosure admissible in evidence at trial. For purposes of this rule, an application for insurance shall not be treated as part of an insurance agreement.

. . . .

1.503(4) *Supplementation of responses.* A party who has made a disclosure under rule 1.500, or who has responded to a request for discovery, is under a duty to supplement or amend the disclosure or response to include information thereafter acquired as follows:

a. A party is under a duty seasonably to supplement ~~the~~ or correct its disclosure or response with respect to ~~any question directly addressed to any of~~ the following:

(1) The identity and location of persons having knowledge of discoverable matters.

(2) The identity of each person expected to be called as a witness at trial.

(3) Any matter that bears materially upon a claim or defense asserted by any party to the action.

b. A party is under a duty seasonably to ~~amend~~ supplement or correct its disclosure or a prior response if the party ~~obtains information upon the basis of which:~~

~~(1) The party knows that the response was incorrect when made.~~

~~(2) The party knows that the response though correct when made is no longer true and the circumstances are such that a failure to amend the response is in substance a knowing concealment.~~

learns that in some material respect the disclosure or response is incomplete or incorrect, and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing.[20]

c. As provided in rule 1.508(3), a party ~~shall~~must supplement discovery as to experts and the substance of their testimony.[21]

[20] The Committee decided to eliminate the "knowing concealment" requirement that currently triggers the duty to supplement incorrect discovery responses. Instead, the Committee recommends following the federal practice of requiring supplementation of any response that the answering party learns is materially incomplete or incorrect unless that information has already otherwise been disclosed in discovery. *See* Fed. R. Civ. P. 26(e)(1)(A).

[21] The referenced provision [rule 1.508(3)] tracks Fed. R. Civ. P. 26(e)(2) governing supplementation of expert witnesses.

d. An additional duty to supplement responses may be imposed by order of the court, agreement of the parties, or at any time prior to trial through new requests to supplement prior responses.

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1.503(6) *Signing disclosures and discovery requests, responses, and objections.*[22]

a. Signature required; effect of signature. Every disclosure under rule 1.500 and every discovery request, response, or objection must be signed by at least one attorney of record in the attorney's own name—or by the party personally, if unrepresented—and must state the signer's name, law firm or name of partnership, association, corporation, or tribe on behalf of which the filing agent is signing, and mailing address, telephone number, and email address. By signing, an attorney or party certifies that to the best of the person's knowledge, information, and belief formed after a reasonable inquiry:

(1) The disclosure is complete and correct as of the time it is made.

(2) The discovery request, response, or objection is:

1. Consistent with these rules and warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law, or for establishing new law.

2. Not interposed for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation.

3. Neither unreasonable nor unduly burdensome or expensive, considering the needs of the case, prior discovery in the case, the amount in controversy, and the importance of the issues at stake in the action.

b. Failure to sign. Other parties have no duty to act on an unsigned disclosure, request, response, or objection until it is signed, and the court must strike it unless a signature is promptly supplied after the omission is called to the attorney's or party's attention.

c. Sanction for improper certification. If a certification violates this rule without substantial justification, the court, on motion or on its own, must impose an appropriate sanction on the signer, the party on whose behalf the signer was acting, or both. The sanction may include an order to pay the reasonable expenses, including attorney's fees, caused by the violation.

[22] This is an entirely new provision patterned on Fed. R. Civ. P. 26(g). Having a separate certification requirement tailored specifically to discovery might more effectively deter the types of discovery abuse reported by the Task Force. *See* rule 1.413(1) amendment (providing that Rule 11 obligation does not apply to discovery).

1.503(7) *Reliance on disclosures and discovery responses of other parties*.[23] Any party can rely on any other party's disclosures or discovery responses to the extent permitted by otherwise applicable evidentiary rules and regardless of when that party is joined. Unless a remaining party requests the responding party to do so, the responding party has no duty to supplement its responses to discovery requests after the propounding party has been dismissed from the case.

1.503(8) *Limitations on frequency and extent*. On motion or on its own, the court must limit the frequency or extent of discovery otherwise allowed by these rules if it determines that:

a. The discovery sought is unreasonably cumulative or duplicative, or can be obtained from some other source that is more convenient, less burdensome, or less expensive;

b. The party seeking discovery has had ample opportunity to obtain the information by discovery in the action; or

c. The burden or expense of the proposed discovery outweighs its likely benefit, considering the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the action, and the importance of the discovery in resolving the issues.[24]

[25] This is a new provision.

[24] This mirrors Fed. R. Civ. P. 26(b)(2). Currently, the same provision exists in the protective order rule—rule 1.504(1)(b). Moving the provision to the general discovery provisions emphasizes the proportionality principle and imposes an independent obligation upon the court to police the proportionality of discovery.

Rule 1.504 Protective orders.

1.504(1) Upon motion by a party or by the person from whom discovery is sought or by any person who may be affected thereby, and for good cause shown, the court in which the action is pending or alternatively, on matters relating to a deposition, the court in the district where the deposition is to be taken:

a. May make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following:

(1) That the discovery not be had.

(2) That the discovery may be had only on specified terms and conditions, including a designation of the time or place, or the allocation of expenses.[25]

(3) That the discovery may be had only by a method of discovery other than that selected by the party seeking discovery.

(4) That certain matters not be inquired into, or that the scope of the discovery be limited to certain matters.

(5) That discovery be conducted with no one present except persons designated by the court.

(6) That a deposition after being sealed be opened only by order of the court.

(7) That a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way.

(8) That the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court.

b. ~~Shall~~ On motion or on its own, shall limit the frequency and extent of use of the methods described in rule 1.501(1) ~~if it determines that any of the following applies:~~

~~(1) The discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive.~~

~~(2) The party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought.~~

~~(3) The burden or expense of the proposed discovery outweighs its likely benefit, taking into account the needs of the case, the amount in controversy, the parties' resources, the~~

[25] This is a new proposal based on the proposed amendment to Fed. R. Civ. P. 26(c). The federal proposal explicitly recognizes the court's existing authority to issue protective orders that allocate expenses for disclosure or discovery.

~~importance of the issues at stake in the litigation, and the importance of the proposed discovery in resolving the issues.~~ in accordance with the limitations of rule 1.503(8).[26]

1.504(2) A party need not provide discovery of electronically stored information from sources that the party identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the party from whom discovery is sought must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of rule ~~1.504(1)(*b*)~~1.503(8). The court may specify conditions for the discovery.

1.504(3) A motion for protective order must include a certification that the movant has in good faith personally spoken with or attempted to speak with other affected parties in an effort to resolve the dispute without court action. The certification must identify the date and time of the personal conference and of any attempts to confer.[27] If the motion for a protective order is denied in whole or in part, the court may, on such terms and conditions as are just, order that any party or person provide or permit discovery. The provisions of rule 1.517(1)(*d*) apply to the award of expenses incurred in relation to the motion.

[26] Rather than repeating the proportionality limitations that will be contained in the amended scope of discovery rule, proportionality is now merely cross-referenced in the protective order rule. Appropriate deletions to rule 1.504(1)(b) have been made. Additionally, in recognition of the court's independent obligation to ensure the proportionality of discovery, the rule now expressly authorizes the trial court to *sua sponte* limit the frequency and extent of discovery.

[27] This reiterates the litigants' obligation to confer in an attempt to resolve the disputed issues.

Rule 1.505 ~~Sequence and timing~~ Timing and sequence of discovery.[28]

1.505(1) *Timing*. A party may not seek discovery from any source before the parties have conferred as required by rule 1.507, except in a proceeding exempt from initial disclosure under Rule 1.500(1)(e), or when authorized by these rules, by stipulation, or by court order.

1.505(2) *Sequence*. Unless the court upon motion orders otherwise for the convenience of parties and witnesses and in the interests of justice, methods of discovery may be used in any sequence and the fact that a party is conducting discovery, whether by deposition or otherwise, shall not operate to delay any other party's discovery.

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[28] The rule has been subdivided to add the discovery moratorium required by the adoption of initial disclosures. *See* Fed. R. Civ. P. 26(d).

Rule 1.507 Discovery conference of the parties.[29]

1.507(1) ~~At any time after commencement of an action, the court may direct the attorneys for the parties to appear before it for a conference on the subject of discovery. The court shall do so upon motion by the attorney for any party if the motion includes:~~

~~*a.* A statement of the issues as they then appear.~~

~~*b.* A proposed plan and schedule of discovery.~~

~~*c.* Any limitations proposed to be placed on discovery.~~

~~*d.* Any issues relating to the discovery and preservation of electronically stored information, including the form in which it should be produced.~~

~~*e.* Any issues relating to claims of privilege or protection as trial-preparation material, including (if the parties agree on a procedure to assert such claims after production) whether to ask the court to include their agreement in an order.~~

~~*f.* Any other proposed orders with respect to discovery.~~

~~*g.* A statement showing that the attorney making the motion has made a reasonable effort to reach agreement with opposing attorneys on the matters set forth in the motion.~~

Conference timing. Except in a proceeding exempt from initial disclosure under rule 1.500(1)(e) or when the court orders otherwise, the parties must confer as soon as practicable,but no later than 14 days after any defendant has answered or appeared.[30] The plaintiff must notify all parties of the discovery conference deadline. Except as otherwise stipulated or ordered by the court, the filing of a pre-answer motion under rule 1.421 does not affect the obligation to participate in the discovery conference or to make disclosures rule 1.500(1) otherwise requires.

1.507(2) ~~Each party and that party's attorney are under a duty to participate in good faith in the framing of a discovery plan if a plan is proposed by the attorney for any party. Notice of the motion shall be served on all parties. Objections or additions to matters set forth in the motion shall be served not later than ten days after service of the motion.~~

[29] The rule has been substantially re-written to provide that the parties, including pro se litigants, have a duty to confer early in a case and cooperate in framing a discovery plan to submit to the court. The rule is patterned on the federal attorney conference rule, Fed. R. Civ. P. 26(f).

[30] Fed. R. Civ. P 26(f) provides that the conference must be held "21 days before a scheduling conference is held or a scheduling order is due under Rule 16(b)." The Advisory Committee struggled to determine the trigger date for the discovery conference and disclosures. It considered various alternatives, including "14 days after the parties have been served," "35 days after the last party has been served," and "at least 21 days after the last answer is due or filed, whichever is earlier." n Initially, the Committee timed the discovery conference from the "date of filing" in order to provide litigants certainty as to the discovery conference deadline. However, the date of filing posed problems in that the discovery conference (and initial disclosures) could theoretically be due before any defendant had answered or had even been served. To clarify that no discovery conference or initial disclosures are required in a default situation, the Committee ultimately selected the date that "any defendant had answered or appeared." Under the existing rules and proposed amendments, a plaintiff would have 90 days after filing to serve the defendant. Iowa R. Civ. P. 1.302(5). The defendant would have 20 days after service of the petition to file an answer (or motion). Iowa R. Civ. P. 1.303(1). The discovery conference would occur within two weeks after the defendant (or the first defendant in a multi-party suit) had answered or appeared. Proposed Iowa R. Civ. P. 1.507(1). Initial disclosures would be due two weeks thereafter. Proposed Iowa R. Civ. P. 1.500(1)(f). Thus, initial disclosures would occur as early as 48 days after service of process (which could occur as late as 90 days after filing). *See also* Proposed Iowa R. Civ. P. 1.500(1)(g) (governing initial disclosures for later joined/served parties).

Conference content; parties' responsibilities. In conferring, parties must consider the nature and basis of their claims and defenses and the possibilities for promptly settling or resolving the case; make or arrange for the disclosures required by rule 1.500(1); discuss any issues about preserving discoverable information; and develop a proposed discovery plan. The attorneys of record and all unrepresented parties that have appeared in the case are jointly responsible for arranging the conference, for attempting in good faith to agree on the proposed discovery plan, and for submitting to the court within 14 days after the conference a written report outlining the plan. The court may order the parties or attorneys to attend the conference in person.

1.507(3) *Discovery plan.* ~~Following the discovery conference, the court shall enter an order tentatively identifying the issues for discovery, setting limitations on discovery, if any, and determining such other matters, including the allocation of expenses, as are necessary for the proper management of discovery in the action. An order may be altered or amended whenever justice so requires.~~ Except as otherwise ordered by the court, a discovery plan must state the parties' views and proposals on:

a. Changes that should be made in the timing, form, or requirement for disclosures under rule 1.501(1), including a statement of when initial disclosures were made or will be made.

b. Subjects on which discovery may be needed, when discovery should be completed, and whether discovery should be conducted in phases or be limited to or focused on particular issues.

c. Issues about disclosure, discovery, or preservation[31] of electronically stored information, including the form or forms in which it should be produced.

d. Issues about claims of privilege or of protection as trial-preparation materials, including—if the parties agree on a procedure to assert these claims after production—whether to ask the court to include their agreement in an order under Iowa Rule of Evidence 5.502.[32]

e. Changes that should be made to the limitations on discovery imposed under these rules, and other limitations that should be imposed.

f. Any other orders that the court should issue under rule 1.504 or under rule 1.602.

1.507(4) *Pretrial conference.* ~~Subject to the right of a party who properly moves for a discovery conference to prompt convening of the conference, the court may combine the discovery conference with a pretrial conference authorized by rule 1.602.~~ Following the parties'

[31] See proposed amendment to Fed. R. Civ. P. 26(f)(3).

[32] The federal advisory committee believes that express reference to "underused" evidence rule 502 will promote its "more effective use." Iowa R. Evid. 5.502 was added to the Iowa Rules of Evidence in 2009. Given the paucity of caselaw citing this provision, the Iowa clawback provision appears underused as well.

discovery conference, any party may move the court to convene a pretrial conference under rule 1.602 to resolve any objection or disputed issue identified in the parties' discovery plan.[33]

[33] This provision is not included in Fed. R. Civ. P. 26(f), because under the federal regime, the pretrial conference/ order is mandatory.

Rule 1.508 Discovery of experts.[34]

1.508(1) *Expert who is expected to be called as a witness.* In addition to the disclosures and discovery provided pursuant to ~~rule~~ rules 1.500(2) and 1.516, discovery of facts known, mental impressions, and opinions held by an expert whom the other party expects to call as a witness at trial, otherwise discoverable under the provisions of rule 1.503(1) and acquired or developed in anticipation of litigation or for trial may be obtained as follows:

~~*a.* A party may through interrogatories require any other party to state the name and address of each person whom the other party expects to call as an expert witness at trial and to state, with reasonable particularity, all of the following:~~

~~(1) The subject matter on which the expert is expected to testify.~~

~~(2) The designated person's qualifications to testify as an expert on such subject.~~

~~(3) The mental impressions and opinions held by the expert and the facts known to the expert (regardless of when the factual information was acquired) which relate to, or form the basis of, the mental impressions and opinions held by the expert.~~

~~Nothing in this rule shall be construed to preclude a witness from testifying as to knowledge of the facts obtained by the witness prior to being retained as an expert or mental impressions or opinions formed by the witness which are based on such knowledge.~~

~~In the case of an expert retained in anticipation of litigation or for trial, answers to interrogatories asking for the qualifications of the person expected to testify as an expert, the mental impressions and opinions held by the expert, and the facts known to the expert shall be separately signed by the designated expert witness. If the party serving such interrogatories believes that the answers were required to be signed by the expert and they were not so signed, the party may object on that basis and move for an order compelling discovery. An objection based on the failure of such answers to be signed by the designated expert shall be asserted within 30 days of service of such answers, otherwise the objection is waived.~~

a. Deposition of an expert who may testify. A party may depose any person who has been identified as an expert whose opinions may be presented at trial. If rule 1.500(2)(b) requires a report from the expert, the deposition may be conducted only after the report is provided.

b. Discovery by other means. ~~Discovery by other means is available without leave of court in lieu of or in addition to interrogatories:~~

~~(1) A party may take the deposition of any person identified by any other party as a person expected to be called as an expert witness at trial.~~

~~(2) A~~ Subject to rules 1.508(1) (d) and (e), a party may also obtain discovery of documents and tangible things including all tangible reports, physical models, compilations of data, and other material prepared by an expert or for an expert in anticipation of the expert's trial and deposition testimony. The disclosure of material prepared by an expert used for consultation is required even if it was prepared in anticipation of litigation or for trial when it forms a basis, either in whole or in part, of the opinions of an expert who is expected to be called as a witness.

~~(3) If~~ *c. Tangible form*. Subject to rules 1.508(1) (d) and (e), if the discoverable factual observations, tests, supporting data, calculations, photographs, or opinions of an expert who will

[34] Rule 1.508(1)(a) has been amended in light of the required expert disclosures required by rule 1.500(2). Specifically, the existing provision dealing with expert interrogatories has been substantially revised.

be called as a witness have not been recorded and reduced to tangible form, the court may order these matters be reduced to tangible form and produced within a reasonable time before the date of trial.

d. Trial-preparation protection for draft reports or interrogatory answers. Rule 1.503(3) protects drafts of any report or disclosure required under rule 1.500(2), regardless of the form in which the draft is recorded.[35]

e. Trial-preparation protection for communications between a party's attorney and expert witnesses. Rule 1.503(3) protects communications between the party's attorney and any witness required to provide a report under rule 1.500(2)(b), regardless of the form of the communications, except to the extent that the communications:

(1) Relate to compensation for the expert's study or testimony.

(2) Identify facts or data that the party's attorney provided and that the expert considered in forming the opinions to be expressed.

(3) Identify assumptions that the party's attorney provided and that the expert relied on in forming the opinions to be expressed.

1.508(2) *Expert who is not expected to be called as a witness.* The disclosure of the same information concerning an expert used for consultation and who is not expected to be called as a witness at trial is required if the expert's work product forms a basis, either in whole or in part, of the opinions of an expert who is expected to be called as a witness. Otherwise, a party may discover the identity of and facts known, or mental impressions and opinions held, by an expert who has been retained or specially employed by another party in anticipation of litigation or preparation for trial and who is not expected to be called as a witness at trial, only as provided in rule 1.516 or upon a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means.

1.508(3) *Duty to supplement discovery as to experts.* ~~If a party expects to call an expert witness when the identity or the substance of such expert witness' testimony has not been previously disclosed in response to an appropriate inquiry directly addressed to these matters, or when the substance of an expert's testimony has been updated, revised or changed since the response, such response must be supplemented to include the information described in rule 1.508(1)(*a*)(1) to (3), as soon as practicable, but in no event less than 30 days prior to the beginning of trial except on leave of court. If the identity of an expert witness and the information described in rule 1.508(1)(*a*)(1) to (3) are not disclosed or supplemented in compliance with this rule, the court in its discretion may exclude or limit the testimony of such expert, or make such orders in regard to the nondisclosure as are just.~~For an expert whose report must be disclosed under rule 1.500(2)(b), the party's duty to supplement extends both to

[35] Rules 1.508(1) (d) and (e) are new provisions that mirror the 2010 amendments to the federal expert witness rules. *See* Fed. R. Civ. P. 26(b)(4)(C) and (D).

information included in the report and to information given during the expert's deposition.[36] Any additions or changes to this information must be disclosed no later than thirty (30) days before trial. [37] Failure to disclose or supplement the identity of an expert witness or the information described in rule 1.500(2) is subject to sanctions under rule 1.517(3)(a).

1.508(4) *Expert testimony at trial.* ~~To the extent that the facts known, or mental impressions and opinions held, by an expert have been developed in discovery proceedings under rule 1.508(1)(*a*) or 1.508(1)(*b*), the~~ The expert's direct testimony at trial may not be inconsistent with or go beyond the fair scope of the expert's ~~testimony in the discovery proceedings as set forth in the expert's deposition, answer to interrogatories,~~ disclosures, ~~separate~~ report, deposition testimony, or supplement thereto. ~~However, the expert shall not be prevented from testifying as to facts or mental impressions and opinions on matters with respect to which the expert has not been interrogated in the discovery proceedings.~~[38]

~~**1.508(5)** *Court's discretion to compel disclosure of experts.* The court has discretion to compel a party to make the determination and disclosure of whether an expert is expected to be called as a witness and shall do so to ensure that determination and the disclosures required by this rule occur within a reasonable and specific time before the date of trial. Upon motion, or at a discovery conference held pursuant to rule 1.507, or on its own initiative, the court may prescribe the sequence in which the parties make the determination and disclosures provided for under this rule.~~

~~**1.508(6)**~~ **1.508(5)** *Expert fees during discovery.* Unless manifest injustice would result, the court shall require that the party seeking discovery pay the expert a reasonable fee for time spent in responding to discovery under rules 1.508(1)~~(*b*)~~ and 1.508(2). With respect to discovery obtained under rule 1.508(1)~~(*b*)~~, the court may require, and with respect to discovery obtained under rule 1.508(2), the court shall require the party seeking discovery to pay the other party a fair portion of the fees and expenses reasonably incurred by the latter party in obtaining facts and

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[36] This mirrors the first part of Fed. R. Civ. P. 26(e)(2).

[37] Under Fed. R. Civ. P. 26(e)(2), supplementation of expert information must occur by the time pretrial disclosures under Fed. R. Civ. P. 26(a)(3) are due [30 days before trial]. Although the Committee decided to compress the pretrial disclosure deadline for non-expert matters, (rule 1.500(3)(b) (requiring that pretrial disclosures be made within 14 days of trial)), it recommends that expert information be supplemented no later than 30 days before trial.

[38] Because expert disclosures are automatic under the amended rule 1.500(2), much of current rule 1.508(4) [Expert testimony at trial] and all of rule 1.508(5) [Court's discretion to compel disclosure of experts] have been deleted. Current rule 1.508(4) reads:

> *Expert testimony at trial.* To the extent that the facts known, or mental impressions and opinions held by an expert have been developed in discovery proceedings under rule 1.508(1)(a) or 1.508(1)(b), the expert's direct testimony at trial may not be inconsistent with or go beyond the fair scope of the expert's testimony in the discovery proceedings as set forth in the expert's deposition, answer to interrogatories, separate report, or supplement thereto. However, the expert shall not be prevented from testifying as to facts or mental impressions and opinions on matters with respect to which the expert has not been interrogated in the discovery proceedings.

opinions from the expert. Any fee which the court requires to be paid shall not exceed the expert's customary hourly or daily fee; and, in connection with a party's deposition of another party's expert, shall include the time reasonably and necessarily spent in connection with such deposition, including time spent in travel to and from the deposition, but excluding time spent in preparation.

Rule 1.509 Interrogatories to parties.[39]

1.509(1) *Availability; procedures for use.*

a. Except in small claims, any party may serve written interrogatories to be answered by another party or, if the other party is a public or private corporation or a partnership or association or governmental agency, by any officer or agent, who shall furnish such information as is available to the party. Interrogatories may, without leave of court, be directed to the plaintiff after commencement of the action and upon any other party with or after service of the original notice upon that party.

b. Each interrogatory, unless the court has ordered otherwise, ~~shall~~ must be ~~followed by a reasonable space for insertion of the answer unless the interrogatories are~~ provided electronically in ~~an electronic~~ a word processing format ~~in which an answer can be inserted~~. An interrogatory ~~which~~ that does not comply with this requirement is subject to objection.

c. Each interrogatory ~~shall~~ must, to the extent it is not objected to, be answered separately and fully in writing under oath [40]~~, unless it is objected to, in which event the reasons for objection shall be stated in lieu of an answer~~. The grounds for objecting to an interrogatory must be stated with specificity. Any ground not stated in a timely objection is waived unless the court, for good cause, excuses the failure.[41] A party may answer an interrogatory in whole or in part subject to an objection without waiving that objection. Any answer so provided is subject to the duty to supplement set forth in rule 1.503(4), but the party does not waive the objection by supplementing. Where an answer is provided subject to an objection, the answering party must specify the extent to which the requested information has not been provided.

d. A party answering interrogatories must set out each interrogatory immediately preceding the answer to it. A failure to comply with this rule shall be deemed a failure to answer and shall be subject to sanctions as provided in rule 1.517. Answers are to be signed by the person making them. Answers shall not be filed; however, they shall be served upon all adverse parties within 30 days after the interrogatories are served. Objections, if any, shall be served within 30 days after the interrogatories are served. Defendants, however, ~~shall~~ may serve their objections or answers within 60 days after they have been served original notice. The court may allow a shorter or longer time. The party submitting the interrogatories may move for an order under rule 1.517(1) with respect to any objection to or other failure to answer an interrogatory.

e. Except as provided in rule 1.509(4), ~~A~~ a party ~~shall~~must not serve more than 30 interrogatories on any other party ~~except upon agreement of~~ unless otherwise stipulated or

[39] Rule 1.509 has been sub-divided in a manner that minimizes disruption of existing precedent.

[40] Fed. R. Civ. P. 33(b)(3).

[41] Fed. R. Civ. P. 33(b)(4).

ordered by the ~~parties or leave of~~ court ~~granted upon a showing of~~ for good cause shown.[42] A motion for leave of court to serve more than 30 interrogatories must be in writing and shall set forth the proposed interrogatories and the reasons establishing good cause for their use.

1.509(2) *Scope; use at trial.*

a. Interrogatories may relate to any matters which can be inquired into under rule 1.503, including a statement of the specific dollar amount of money damages claimed, the amounts claimed for separate items of damage, and the names and addresses of witnesses the party expects to call to testify at the trial. Interrogatory answers may be used to the extent permitted by the rules of evidence.

b. An interrogatory otherwise proper is not necessarily objectionable merely because an answer to the interrogatory involves an opinion or contention that relates to fact or the application of law to fact, but the court may order that such an interrogatory need not be answered until after designated discovery has been completed or until a pretrial conference or other later time.

1.509(3) *Option to produce business records.* Where the answer to an interrogatory may be derived or ascertained from the business records, including electronically stored information, of the party upon whom the interrogatory has been served or from an examination, audit or inspection of such business records, or from a compilation, abstract or summary based thereon, and the burden of deriving or ascertaining the answer is substantially the same for the party serving the interrogatory as for the party served, it is a sufficient answer to such interrogatory to specify the records from which the answer may be derived or ascertained and to afford to the party serving the interrogatory reasonable opportunity to examine, audit or inspect such records and to make copies, compilations, abstracts or summaries. A specification shall be in sufficient detail to permit the party serving the interrogatory to locate and identify as readily as can the party served, the records from which the answer may be ascertained.

1.509(4) *Pattern interrogatories.* The supreme court, by administrative order, may approve pattern interrogatories for different classes of cases.[43] Any pattern interrogatory and its subparts

[42] The Advisory Committee did not recommend further limiting the number of permissible interrogatories. In order to ensure that the maximum number is not abused, amended rule 1.509(4) provides that any discrete subpart to a non-pattern interrogatory shall be considered a separate interrogatory. *See* Fed. R. Civ. P. 33(a)(1).

[43] See Ill. R. Civ. P. 213(j). The Comment to the Illinois rule states: "In an effort to avoid discovery disputes, the practitioner is encouraged to utilize interrogatories approved by the Supreme Court pursuant to paragraph (j) whenever possible." Comment, Ill. R. Civ. P. 213. The accompanying Appendix to the rule contains "Standard Interrogatories" and states:

> "A party may use one or more interrogatories which are part of a form set of interrogatories. Any such interrogatory so used shall be counted as one interrogatory in determining the total number of interrogatories propounded, regardless of any subparts or multiple inquiries therein. A party may combine form interrogatories with other interrogatories, subject to applicable limitations as to number. A party shall avoid propounding a form interrogatory which has no application to the case."

shall be counted as one interrogatory. Any discrete subpart to a non-pattern interrogatory shall be considered as a separate interrogatory.

. . . .

Appendix, Ill. R. Civ. P. 213. The Appendix includes motor vehicle interrogatories to plaintiffs, motor vehicle interrogatories to defendants, matrimonial interrogatories, medical malpractice interrogatories to plaintiffs, medical malpractice interrogatories to defendant doctor, and medical malpractice interrogatories to defendant hospital.

Colorado utilizes a similar approach. Colo. R. Civ. P. 33(e) states:

> **(e) Pattern and Non-Pattern Interrogatories; Limitations.** The pattern interrogatories set forth in the Appendix to Chapter 4, Form 20, are approved. Any pattern interrogatory and its subparts shall be counted as one interrogatory. Any subpart to a non-pattern interrogatory shall be considered as a separate interrogatory.

The referenced Appendix to the Colorado rule contains pattern interrogatories addressing: identity of persons answering interrogatories; general background—individual; general background—business entity; insurance; physical, mental, or emotional injuries; property damage; loss of income or earning capacity; other damages; medical history; other claims and previous claims; investigation—general; investigation—surveillance; statutory or regulatory violations; affirmative defenses; defendant's contentions—personal injury; responses to requests for admissions; how the incident occurred—motor vehicle. Colo. R. Civ. P. Form 20 (Pattern Interrogatories under Rule 33). Arizona, Connecticut, Maryland, and New Jersey also utilize pattern interrogatories.

Rule 1.512. Production of documents, electronically stored information, and things; entry upon land for inspection and other purposes.

1.512(1) *Requests*. Any party may serve on any other party a request:

a. To produce and permit the party making the request, or someone acting on that party's behalf, to inspect, copy, test, or sample any designated documents or electronically stored information—including writings, drawings, graphs, charts, photographs, sound recordings, images, and other data or data compilations stored in any medium from which information can be obtained—translated, if necessary, by the respondent into a reasonably usable form.

b. To inspect, copy, test, or sample any designated tangible things which constitute or contain matters within the scope of rule 1.503 and which are in the possession, custody or control of the party upon whom the request is served.

c. To permit, except as otherwise provided by statute, entry upon designated land or other property in the possession or control of the party upon whom the request is served for the purpose of inspection and measuring, surveying, photographing, testing, or sampling the property or any designated object or operation thereon, within the scope of rule 1.503.

1.512(2) *Procedure.*

a. Making requests. The request may, without leave of court, be served upon the plaintiff after commencement of the action and upon any other party with or after service of the original notice upon that party. The request shall set forth the items to be inspected either by individual item or by category, and describe each item and category with reasonable particularity. The request shall specify a reasonable time, place, and manner of making the inspection and performing the related acts. The request may specify the form in which electronically stored information is to be produced.

b. Responses and objections.

(1) The party upon whom the request is served shall serve a written response within 30 days after the service of the request, except that a defendant may serve a response within 60 days after service of the original notice upon that defendant. The court may allow a shorter or longer time. ~~The response shall state, with respect to each item or category, that inspection and related activities will be permitted as requested, unless the request is objected to, including an objection to the requested form for producing electronically stored information, stating the reasons for the objection. If objection is made to part of an item or category, the part shall be specified. If objection is made to the requested form for producing electronically stored information—or if no form was specified in the request—the responding party must state the form it intends to use.~~

(2) For each item or category, the response must either state that inspection and related activities will be permitted as requested or state the grounds for objecting to the request with

specificity, including reasons.[44] If the responding party states that it will produce copies of documents or of electronically stored information instead of permitting inspection, the production must be completed no later than the time for inspection stated in the request or a later reasonable time stated in the response.[45]

(3) Any ground not stated in a timely objection is waived unless the court, for good cause, excuses the failure. A party may respond to a request in whole or in part subject to an objection without waiving that objection. Any response so provided is subject to the duty to supplement set forth in rule 1.503(4), but the party does not waive the objection by supplementing.[46]

(4) An objection to part of a request must specify the part and permit inspection of the rest. Where a response is provided subject to an objection, the responding party must specify the extent to which the requested information has not been provided.[47]

(5) The response may state an objection to a requested form for producing electronically stored information. If the responding party objects to a requested form for producing electronically stored information—or if no form was specified in the request—the responding party must state the form or forms it intends to use.

c. Motion to compel. The party submitting the request may move for an order under rule 1.517 with respect to any objection to or other failure to respond to the request or any part thereof, or any failure to permit inspection as requested.

d. Production. Unless the parties otherwise agree, or the court otherwise orders:

(1) A party who produces documents for inspection shall produce them as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the request.

(2) If a request does not specify the form for producing electronically stored information, the responding party must produce the information in a form in which it is ordinarily maintained or in a form that is reasonably usable.

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[44] *See also* proposed amendment to Fed. R. Civ. P. 34(b)(2)(B). Like the amendment to rule 1.509(1)(c), this amendment requires specificity in objecting to requests for production.

[45] Proposed amendment to Fed. R. Civ. P. 34. According to the advisory committee note, this amendment reflects the "common practice of producing copies of documents. . . rather than simply permitting inspection." It further specifies when such copies must be produced in lieu of inspection.

[46] This parallels changes made in rule 1.509(1)(c) governing interrogatories.

[47] *See also* proposed amendment to Fed. R. Civ. P. 34 ("An objection must state whether any responsive materials are being withheld on the basis of that objection."). According to the advisory committee note, this "should end the confusion that frequently arises when a producing party states several objections and still produces information, leaving the requesting party uncertain whether any relevant and responsive information has been withheld on the basis of the objections."

(3) A party need not produce the same electronically stored information in more than one form.

1.512(3) *Pattern requests*. The supreme court, by administrative order, may approve pattern requests for production for different classes of cases.[48]

. . . .

[48] This provision authorizes the development and use of pattern requests for production similar to the pattern interrogatories encouraged in rule 1.509(4). The Committee has compiled an extensive collection of pattern interrogatories and requests for production from other jurisdictions for use in developing such pattern discovery.

Rule 1.517 Consequences of failure to make disclosures or discovery.

1.517(1) *Motion for order compelling disclosures or discovery.* A party, upon reasonable notice to other parties and all persons affected thereby, may move for an order compelling disclosure or discovery as follows:

a. Appropriate court. A motion for an order to a party may be made to the court in which the action is pending, or, on matters relating to a deposition, to the court in the district where the deposition is being taken. A motion for an order to a deponent who is not a party shall be made to the court in the district where the deposition is being taken.

b. ~~Motion~~ Specific motions.[49]

(1) To compel disclosure. If a party fails to make a disclosure required by rule 1.500, any other party may move to compel disclosure and for appropriate sanctions.

(2) To compel a discovery response. If a deponent fails to answer a question propounded or submitted under rule 1.701 or 1.710, or a corporation or other entity fails to make a designation under rule 1.707(5), or a party fails to answer an interrogatory submitted under rule 1.509, or if a party, in response to a request for inspection submitted under rule 1.512, fails to produce documents,[50] or fails to respond that inspection will be permitted, ~~as requested~~ or fails to permit inspection ~~as requested,~~ the party seeking discovery may move for an order compelling an answer, a designation, or an inspection in accordance with the request.

(3) Related to a deposition. When taking a deposition on oral examination, the proponent of the question may complete or adjourn the examination before moving for an order.

(4) Default; notice; protective orders. If a motion to compel is filed and the time for resistance of that motion has expired without a resistance having been filed, the court may grant the motion without a hearing.

1. Any order granting a motion made under this rule shall include a statement that a failure to comply with the order may result in the imposition of sanctions pursuant to rule 1.517.

2. In ruling on such motion, the court may make such protective order as it would have been empowered to make on a motion pursuant to rule 1.504(1).

c. Evasive or incomplete answer. For purposes of this rule an evasive or incomplete answer is to be treated as a failure to answer.

[49] Existing rule 1.517(b) is divided into four subsections in order to add the disclosure provision, enhance clarity, and permit a court to grant a motion to compel without a hearing if the time for resistance has expired.

[50] Proposed amendment to Fed. R. Civ. P. 37(a)(3)(iv) that "reflect[s] the common practice of producing copies of documents . . . rather than simply permitting inspection."

d. Award of expenses of motion. [51]

(1) If the motion is granted, or if the disclosure or requested discovery is provided after the motion was filed, the court shall, after opportunity for hearing, require the party or deponent whose conduct necessitated the motion or the party or attorney advising such conduct or both of them to pay to the moving party the reasonable expenses incurred in obtaining the order, including attorney's fees, unless the court finds that the opposition to the motion was substantially justified or that other circumstances make an award of expenses unjust.

(2) If the motion is denied, the court shall, after opportunity for hearing, require the moving party or the attorney advising the motion or both of them to pay to the party or deponent who opposed the motion the reasonable expenses incurred in opposing the motion, including attorney's fees, unless the court finds that the making of the motion was substantially justified or that other circumstances make an award of expenses unjust.

(3) If the motion is granted in part and denied in part, the court may apportion the reasonable expenses incurred in relation to the motion among the parties and persons in a just manner.[52]

e. Notice to litigants. If the motion is granted, the court shall direct the clerk to ~~mail~~serve[53] a copy of the order to counsel and to the party or parties whose conduct, individually or by counsel, necessitated the motion.

1.517(2) *Failure to comply with order.*

a. Sanctions by court in district where deposition is taken. If a deponent fails to be sworn or to answer a question after being directed to do so by the court in the district in which the deposition is being taken, the failure may be considered a contempt of that court.

b. Sanctions by court in which action is pending. If a party or an officer, director, or managing agent of a party or a person designated under rule 1.707(5) to testify on behalf of a party fails to obey an order to provide or permit discovery, including an order made under rule 1.515 or rule 1.517(1), the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following:

(1) An order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order.

(2) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting such party from introducing designated matters in evidence.

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[51] Rule 1.517(d) is divided into numbered subsections to enhance clarity.

[52] Fed. R. Civ. P. 37(a)(5) divides this provision into three subparts: (A) If Motion is Granted (or Disclosure or Discovery is Provided After Filing); (B) If the Motion is Denied; and (C) If the Motion is Granted in Part and Denied in Part.

[53] The EDMS rules use the term "serve."

(3) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party.

(4) In lieu of any of the foregoing orders or in addition thereto, an order treating as a contempt of court the failure to obey any orders except an order to submit to a physical or mental examination.

(5) In lieu of any of the foregoing orders or in addition thereto, the court shall require the disobedient party or the attorney advising such party or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

1.517(3) ~~*Expenses on failure to admit.*~~ *Failure to disclose, to supplement an earlier response, or to admit.*[54]

a. Failure to disclose or supplement. If a party fails to provide information or identify a witness as required by rules 1.500, 1.503(4), or 1.508(3), the party is not allowed to use that information or witness to supply evidence on a motion, at a hearing, or at a trial, unless the failure was substantially justified or is harmless. In addition or instead of this sanction, the court, on motion or after giving an opportunity to be heard:

(1) May order payment of the reasonable expenses, including attorney's fees, caused by the failure.

(2) May inform the jury of the party's failure.

(3) May impose other appropriate sanctions, including any of the orders listed in rule 1.517(2)(b).

b. Expenses on failure to admit. If a party fails to admit the genuineness of any document or the truth of any matter as requested under rule 1.510, and if the party requesting the admissions thereafter proves the genuineness of the document or the truth of the matter, the requesting party may move for an order requiring the other party to pay the reasonable expenses incurred in making that proof, including reasonable attorney's fees. The court shall make the order unless it finds any of the following:

~~*a.*~~(1) The request was held objectionable pursuant to rule 1.510.

~~*b.*~~(2) The admission sought was of no substantial importance.

[54] Existing Rule 1.517(3) deals only with "Expenses on failure to admit." The rule has been amended to mirror Fed. R. Civ. P. 37(c), which governs failure to disclose, supplement and admit. The subdivision has been re-numbered to reflect these additions.

~~*c.*~~(3) The party failing to admit had reasonable grounds to believe that the party might prevail on the matter.

~~*d.*~~(4) There was other good reason for the failure to admit.

1.517(4) *Failure of party to attend at own deposition or serve answers to interrogatories or respond to request for inspection.*[55] If a party or an officer, director, or managing agent of a party or a person designated under rule 1.707(5) to testify on behalf of a party fails:

a. To appear before the officer who is to take the person's deposition, after being served with a proper notice; or

b. To serve answers or objections to interrogatories submitted under rule 1.509, after proper service of the interrogatories; or

c. To serve a written response to a request for inspection submitted under rule 1.512, after proper service of the request, the court in which the action is pending on motion may make such orders in regard to the failure as are just, and among others it may take any action authorized under rule 1.517(2)(*b*)(1), (2), (3), and (5).

The failure to act described in this subrule may not be excused on the ground that the discovery sought is objectionable unless the party failing to act has applied for a protective order as provided by rule 1.504.

1.517(5) *Motions relating to discovery.* No motion relating to depositions, discovery, or discovery sanctions shall be filed with the clerk or considered by the court unless the motion alleges that ~~counsel for~~ the ~~moving party~~ movant[56] has ~~made a~~ in good faith ~~but unsuccessful attempt~~ personally[57] spoken with or attempted to speak with ~~the opposing party~~ other affected parties in an effort to resolve the dispute without court action.[58] ~~issues raised by the motion with opposing counsel without intervention of the court.~~ The certification must identify the date and time of the conference and of any attempts to confer.[59]

1.517(6) *Electronically stored information.* Absent exceptional circumstances, a court may not impose sanctions under these rules on a party for failing to provide electronically stored information lost as a result of the routine, good-faith operation of an electronic information system.

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[56] Existing Rule 1.517(5) reads: "No motion relating to depositions or discovery shall be filed with the clerk or considered by the court unless the motion alleges that *counsel for the moving party* has made a good faith but unsuccessful attempt to resolve the issues raised by the motion with opposing counsel without intervention of the court." (Emphasis added.)

[57] This conforms the rule with changes made to rules 1.501(3) and 1.504(3).

[59] *See* cross-reference in rule 1.501(3) (adding a certificate of conference requirement for all discovery motions).

1.517(7) *Failure to participate in framing a discovery plan*. If a party or its attorney fails to participate in good faith in developing and submitting a proposed discovery plan as rule 1.507 requires, the court may, after giving an opportunity to be heard, require that party or attorney to pay to any other party the reasonable expenses, including attorney's fees, that the failure causes.

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DIVISION VII
DEPOSITIONS AND PERPETUATING TESTIMONY

A. DEPOSITIONS

Rule 1.701 Depositions upon oral examination.

1.701(1) *When depositions may be taken.*

a. Without leave. ~~After commencement of the action, any~~ Any party may, by deposition upon oral examination, take the testimony of any person, including a party, without leave of court except as provided in rule 1.701(b). The attendance of witnesses may be compelled by subpoena as provided in rule 1.715. ~~by deposition upon oral examination.~~

b. With leave. Leave of court, granted with or without notice, must be obtained ~~only~~ if: ~~the plaintiff seeks to take a deposition prior to the expiration of ten days after the date for motion or answer for any defendant, except that leave is not required under any of the following circumstances:~~

(1) The parties have not stipulated to the deposition and the party seeks to take the deposition before the time specified in rule 1.505(1), unless special notice is given as provided in rule 1.701(2);[60] or

~~*a.* If a defendant has served a notice of taking deposition or otherwise sought discovery.~~

~~*b.* If special notice is given as provided in rule 1.701(2)(*b*);~~

(2) The parties have not stipulated to the deposition and the deponent has already been deposed in the case;[61] or

~~The attendance of witnesses may be compelled by subpoena as provided in rule 1.715.~~

(3) ~~The deposition of a person~~ The deponent is confined in prison ~~may be taken only by leave of court on such terms as the court prescribes~~.

. . . .

[60] *See* Fed. R. Civ. P. 30(a)(2)(A)(iii). The discovery moratorium in rule 1.505 requires that a party receive leave of court (absent stipulation) to take any deposition before the attorney conference/initial disclosures. Thus, current rule 1.701(1)(b) is no longer necessary. Instead, leave is required if a party wishes to take a deposition before initial disclosures have occurred, unless necessary to perpetuate testimony.

[61] This provision amends the deposition rule to provide that a witness may be deposed only once without leave of court. *See* Fed. R. Civ. P. 30(a)(2)(A)(ii).

Rule 1.708 Conduct of oral deposition.[62]

1.708(1) *Examination; cross-examination; recording examination; administering the oath; objections; written questions.*

a. Examination and cross-examination; recording examination; administering oath. Examination and cross-examination of witnesses may proceed as permitted at the trial. The officer before whom the deposition is to be taken shall put the witness under oath and shall personally, or by someone acting under the officer's direction and in the officer's presence, record the testimony of the witness. The testimony shall be taken stenographically or recorded by any other means ordered in accordance with rule 1.701(4). If requested by one of the parties, the testimony shall be transcribed.

b. Objections. All objections made at the time of the examination to the qualifications of the officer taking the deposition, or to the manner of taking it, or to the evidence presented, or to the conduct of any party, and any other objection to the proceedings, shall be noted by the officer upon the deposition. Evidence objected to shall be taken subject to the objections. An objection must be stated concisely in a nonargumentative and nonsuggestive manner. A person may instruct a deponent not to answer only when necessary to preserve a privilege, to enforce a limitation ordered by the court, or to present a motion under Rule 1.708(2).

c. Participating through written questions. In lieu of participating in the oral examination, parties may serve written questions in a sealed envelope on the party taking the deposition who shall transmit them to the officer. The officer shall propound them to the witness and record the answers verbatim.

1.708(2) *Sanction;~~Motion~~ motion to terminate or limit examination.*

a. Sanction. The court may impose an appropriate sanction, including the reasonable expenses and attorney's fees incurred by any party, on a person who impedes, delays, or frustrates the fair examination of the deponent.

b. Motion to terminate or limit. At any time during the taking of the deposition, on motion of a party or of the deponent and upon a showing that the examination is being conducted in bad faith or in such manner as unreasonably to annoy, embarrass, or oppress the deponent or party, the court in which the action is pending or the court in the district where the deposition is being taken may order the officer conducting the examination to cease forthwith from taking the deposition, or may limit the scope and manner of the taking of the deposition as provided in rule 1.504. If the order made terminates the examination, it shall be resumed thereafter only upon the order of the court in which the action is pending. Upon demand of the objecting party or deponent, the taking of the deposition shall be suspended for the time necessary to make a motion for an order. The provisions of rule 1.517(1)(*d*) apply to the award of expenses incurred in relation to the motion.

[62] Rules 1.708(1) and (2) are subdivided in order to break apart their diverse elements and to track Fed. R. Civ. P. 30(c).